

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL ACTION NO: HBC 147 OF 2013

BETWEEN : **VIRENDRA SINGH** of 41 Northwich Ct, Sacramento, CA 95832, United States of America and **SHAIENDRA PRASAD** also known as **SHELENDRA SUMAN PRASAD** of Ragg Avenue, Tamavua, Suva.

PLAINTIFF

AND : **CHANDRESH ARUN PRASAD** of Varadoli, Ba, Fiji.

FIRST DEFENDANT

AND : **JOSEPHINE SANJINI LATA PRASAD** of Varadoli, Ba, Fiji.

SECOND DEFENDANT

AND : **RASHIKENDRA SINGH** of 2 Emma Place, North Natomas Sacramento, CA 95835, United States of America, **RAJESH SINGH** of 809 Applewood Dr. S.E Calgary, Alberta, T2A-7T5, Canada, **AKLESH PRASAD** of 24 Albalone Way NE Calgary, Alberta, T2A-6Y7, Canada and **CHANDRA PRABHASH** of 10 Shiv Street, Varadoli, Ba, Fiji.

THIRD DEFENDANT

AND : **WESTERN LAND DEVELOPMENT AND INVESTMENT COMPANY LIMITED** a limited liability company having its registered office at Ba, Fiji.

FOURTH DEFENDANT

Appearances : Mr W. Pillay for First Defendant/Applicant
Ms V. Lidise for the Plaintiffs/Respondents
Date of Hearing : 01 July 2016
Date of Ruling : 10 April 2017

R U L I N G

Introduction

[01] This is an application for leave to appeal the decision of the learned Master (the Master) dated 9 October 2015.

[02] By summons dated 10 November 2015 and filed on 23 October 2015 (the application), the first defendant seeks the following orders:

1. *That leave be granted to the First Defendant to Appeal the Order of the Master of the High Court dated 9th October 2015 where the Master struck out the First Defendant's Statement of Defence.*
2. *That the costs of this application be costs in the cause.*
3. *That the parties be at liberty to seek further directions as required for the better conduct of this action.*

[03] The application states that the defendant intends to rely upon the affidavit of Chandresh Arun Prasad sworn on 14 October 2015. However, the application does not state the Order or law which the application is made under.

[04] After filing the application, on 4 February 2016, the first defendant also filed an application seeking leave to amend the summons for leave to appeal the decision of the Master dated 9 October 2015. ("Application for Amendment"). The application is supported by an affidavit of Mohammed Zubier Hussein, Legal Executive employed by the first Defendant's solicitor.

[05] Essentially, there are two applications before me, namely (i) an application for leave to appeal and (ii) an application to amend that application.

[06] Both applications are opposed by the plaintiffs and they filed an affidavit of Shailendra Prasad a.k.a Shelendra Suman Prasad sworn on 5 December 2015.

[07] At the hearing, both parties tendered their written submission and agreed to file answering submissions. However, the counsel appearing for the Plaintiffs indicated that she has some preliminary points in respect of the service of the application upon the plaintiffs. The court granted 28 days for both parties to file and serve their respective answering submissions simultaneously. Accordingly, only the first defendant filed further submissions.

The Background before the Master

[08] 1. The Plaintiff filed a summons for Specific Discovery which was returnable on 6 July 2015 when the Master ordered among other things that the First Defendant files his affidavit of opposition to the summons for Discovery within 21 days and adjourned the matter to 26 August 2015 for the hearing of the summons. The first defendant did not file his affidavit in opposition. Instead, on 26 August 2015, Mr Wasu Pillay appeared for the First Defendant and consented to orders in terms of paragraphs 1 & 2 of the Summons and furthermore to the order that the documents to be disclosed on or before 23 September 2015. The matter was adjourned to 24 September 2015.

2. On 24 September 2015, although there was no appearance by or for the first Defendant, the Master granted further 14 days to the first Defendant to comply with the order of 26 August 2015 and ordered the documents to be disclosed on or before 08 October 2015 and if the orders are not complied with, the Statement of Defence will be struck out under Order 24 rule 16 (1) (b) and adjourned the matter to 09 October 2015 to check on the compliance.

3. The matter was called again on 09 October 2015 when Mr Pillay asked for another 7 days to comply with the order, whereas the Master refused this and activated the unless order he made on 24

September 2015. As a result, the first Defendant's Statement of Defence was struck out. The First Defendant seeks leave to appeal this order.

The Law

- [09] The application seeking leave to appeal filed by the first Defendant does not state the rule or the law which the application is made under. In order to remedy this, the first Defendant has filed an application to amend the original application. By the amendment, the first Defendant intends to include the law which the application for leave to appeal is made under, which intends to state that:

"The application is made pursuant to Section 12 (2) (f) to the Court of Appeal Act Order 26, Order 27 and Order 34 of the Court of Appeal Rules, the inherent jurisdiction of the Honourable Court".

- [10] The Defendant seeks to appeal an interlocutory decision of the Master. Therefore, Order 59, rule 9 of the High Court Rules 1988, as amended (the HCR) is the relevant rule, which states:-

An appeal from an order or judgment of the Master shall be filed and served within the following period –

- (a) 21 days from the date of delivery of an order or judgment; or*
- (b) In the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal.*

Test for granting Leave to Appeal

- [11] In ***Prasad v Republic of Fiji & Attorney General*** (No 3) [2000] FJHC 265; [2000] 2FLR 81 Justice Gates (as he then was) dealing with an application for leave to appeal to set aside interlocutory order states:

"In an application for leave to appeal the order to be appealed from must be seen to be clearly wrong or at least attended

*with sufficient doubt and causing some substantial injustice before leave will be granted see **Rogerson v. Law Society of the Northern Territory** [1993] 88 NTR 1 at 5-33; **Niemann v. Electronic Industries Ltd.** [1978] VR 451; **Nationwide News Pty. Ltd. (t/a Centralian Advocate) v. Bradshaw** (1986) 41 NTR 1.*

*Fiji's legislative policy against appeals from interlocutory orders appears to be similar inter alia to that of the State of Victoria, **Perry v Smith** (1901) 27 VLR 66 at 68; and also with appeals to the High Court of Australia, see *Ex parte Bucknell* [1936] HCA 67; [1976] 56 CLR 221 at 223. If it is necessary for instance to expose a patent mistake of law in the judgment or to show that the result of the decision is so unreasonable or unjust as to demonstrate error, then leave will be given *Niemann (supra)* at 432. If is not sufficient for an appeal court to gauge, that when faced with the same material or situation. It would have decided the matter different. The court must be satisfied that the decision is clearly wrong (*Niemann* at 436).*

*Leave could be given for an exceptional circumstance such as if the order has the effect of determining the rights of the parties *Bucknell (supra)* at 225; **Dunstan v Simmie & Co. Pty Ltd** [1978] VR 669 at 670. This is not the case here. Leave could also be given if "substantial injustice would result from allowing the order, which it is sought to impugn to stand," *Dunstan (supra)* at 670; *Darrellea (Vic.) Pty Ltd v Union Assurance Society of Austria Ltd* [1969] VR 401 at 408."*

- [12] The first Defendant seeks leave to appeal an interlocutory order of 09 October 2015 delivered by the Master of the High Court.
- [13] The Plaintiffs filed a summons for specific discovery against the first Defendant. He through his Solicitor (Mr W. Pillay) consented to

provide the documents sought. The Master accordingly ordered the documents to be disclosed on or before 23 September 2015 and adjourned the matter to 24 September 2015, to check on compliance. On 24 September 2015, there was no appearance by or for the first Defendant. However, the Master granted further 14 days to the first Defendant to comply with the order and also made an unless order that if the order is not complied with, the Statement of Defence will be struck out and the matter was adjourned to 09 October 2015 when Mr Pillay, counsel for the first Defendant sought final 7 days to comply with the order. The Master refused this application, activated the unless order and struck out the Statement of Defence filed by the first Defendant. This is the order the first Defendant seeks leave to appeal.

[14] It will be noted that the first Defendant seeks leave appeal a consequential order from non-compliance of the order made by consent.

[15] The order of the Master dated 9 October 2015 which struck out the first Defendant's statement of defence is an interlocutory order. There is no issue or dispute on this point.

Time for appealing an interlocutory order

[16] An interlocutory order made by the Master may be appealed with the leave of a High Court Judge under O.59, r.11 of the HCR, which reads:-

O.59, r.11-Any **application for leave to appeal an interlocutory order** or judgment shall be made by summons with a supporting affidavit, **filed and served within 14 days** of the delivery of the order or judgment. (Emphasis added)

[17] An application for leave to appeal an interlocutory order or judgment must be made by summons with a supporting affidavit filed and served within 14 days of the delivery of the order or judgment (see O.59, r.11).

[18] The order the first Defendant seeks leave to appeal was made on 9 October 2015. The first Defendant filed his application for leave to appeal on 23 October 2015, the last day for filing and serving such an application. However, it was served on 17 November 2015, which is 24 days after 23 October 2015.

The preliminary issue

[19] Counsel for the plaintiff, Ms V. Lidise, raising a preliminary issue, submits that the application is out of time and cannot be entertained and therefore should be dismissed. She cites and relies on the case authorities of: (i) **Panache Investments Ltd v New India Assurance** [2015] FJHC 523 and (ii) **Deo v Metal Works & Joinery Ltd** [2015] FJHC and (iii) **Hawkes Bay Hide Processors v CIR** (1990) 3 NZLR 313 at 315.

[20] In *Panache* and *Deo* (above), the High Court held the failure to comply with the service requirement is fatal.

[21] Justice Cooke in ‘*Hawkes*’ case (above) said:

“The statute is unambiguous as to the time requirement. I can see no basis on which the Court could hold that the requirement is not mandatory. It does not seem to be legitimate to read into such provision any such words as “or within a reasonable time thereafter” and the doctrine of substantial compliance cannot apply to fixed time limit.”

[22] Mr W. Pillay, counsel for the first Defendant submits that the failure to serve the application for leave to appeal within 14 days as required in O.59, r.11 is an irregularity and any such irregularity can be cured by O.2 r.1 (1) of the HCR, which provides:

“Where, in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or let undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or other therein”.

[23] O.59, r.11 of the HCR dictates specific time limit within which an application for leave to appeal any interlocutory order with a supporting affidavit must be filed and served. The word “shall” in rule 11 denotes that the time limit prescribed therein is mandatory and must be complied with.

[24] As was held in *Hawkes* (above) the doctrine of substantial compliance cannot apply to the fixed time limit.

[25] The Master made the impugned order on 9 October 2015. The first Defendant has to file and serve his application for leave on or before 23 October 2015. The first Defendant served his application for leave upon the plaintiff on 17 November 2015. The first defendant has failed to comply with the requirement of O.59, r.11. Non-compliance as to the specific time limit prescribed by rule 11 is fatal and cannot be cured by invoking O.2, r.1 (1) of the HCR. There is no proper application for leave to appeal the Master’s order of 9 October 2015

made striking out the first Defendant's statement of defence for non-compliance with the consent order. The application for leave to appeal filed by the first Defendant is out of time because it was not filed and served within 14 days and therefore should be dismissed.

Considering the application for leave to appeal

- [26] The application for leave to appeal filed by the first Defendant could be dismissed for non-compliance with the provision of O.59, r.11 of the HCR. However, for the sake of completeness, I would consider the merits of the application.
- [27] The court may grant leave to appeal an interlocutory order if the order to be appealed from: (i) is clearly wrong or at least attended with sufficient doubt and causing some substantial injustice or (ii) has the effect of determining the rights of the parties.
- [28] The first Defendant consented to the orders sought in the summons for specific discovery. Then, the Master granted 21 days to the first Defendant to comply with the consent orders and adjourned the matter to 24 September 2015 when neither the first Defendant nor his counsel appeared. The Master however granted further 14 days to comply with the orders, but with an unless order that if the first Defendant fails to disclose the document as agreed his Statement of Defence will be struck out and adjourned the matter to 9 October 2015. On 9 October 2015 when the matter came up, still the orders were not complied with, the Master activated the unless order and struck out the first Defendant's Statement of Defence.

No grounds of appeal

- [29] The first Defendant did not provide the grounds of appeal he intends to rely on if the leave is granted. Therefore, the court is unable to consider and comment on the prospect of success of the appeal.
- [30] The first Defendant is attempting to purge his default in the compliance of the consent order in the proposed appeal. He, having obtained sufficient time for compliance to the consent order, turns around and says the bank records (the documents to be disclosed pursuant to the consent discovery order) are purged after being kept for the mandatory period of 7 years therefore access to those records is also quit difficult. For the first time, in the application for leave to appeal, the first Defendant has taken this defence for non-compliance with the consent order. There is no evidence from the bank (Westpac) that these bank statements are not available. The afterthought defence that the bank statements are purged and not available for discovery appear to be unlikely to succeed in the appeal. The Master's order does not appear to be wrong. He had acted under O.24, r.16 (1) (b) of the HCR. Under that rule the court is empowered to make such an order if the defendant fails to comply with the requirement of discovery or an order made in that regard.

Whether the Master's order determines the rights of the parties.

- [31] The Master, by his order, struck out the first Defendant's Statement of Defence for non-compliance with the consent discovery order. The Master enter judgment upon the striking the defence filed by the first defendant. This order does not finally determine the rights of the parties. The plaintiff still needs to prove his claim at the trial. The first Defendant may, if he so wishes, cross examine the plaintiffs and their witnesses.

Summons to amend

[32] The first Defendant has filed a summons to amend the summons for leave to appeal. By the amendment, the first Defendant seeks to include the law (s.12 (2) (f) of the Court of Appeal Act, Order 27 and Order 34 of the Court of Appeal Rules and the inherent jurisdiction of the Court) under which the application for leave to appeal is made. The first Defendant applies for leave to appeal the interlocutory order made by the Master. Order 59 of the High Court Rules specifically provides the procedures to be adopted when appealing a Master's order or judgment. Section 12 (2) (f) of the Court of Appeal Act and O.27 and O.34 of the Court of Appeal Rules relates to an interlocutory order or interlocutory judgment made or given by a judge. The law cited in the summons to amend filed by the first Defendant has no relevance to an application for leave to appeal an interlocutory order made by the Master. Therefore, the summons to amend is misconceived and should be dismissed.

[33] When there is specific provision in the HCR (O.59) dealing with appeal from the Master's Court, the first Defendant is not entitled to invoke inherent jurisdiction to seek leave to appeal an interlocutory order given by the Master. Presumably, even if I exercise my inherent jurisdiction, I would not grant leave because the first defendant fails to demonstrate any exceptional circumstances that warrant the hearing of the appeal.

Conclusion

[34] For the foregoing reasons, I do not consider the proposed appeal would have real prospect of success and I could not find any compelling reason why the appeal should be heard. I would therefore refuse leave to appeal the interlocutory order of the Master dated 9 October 2015. I would also dismiss and strike out the summons to

amend filed by the first Defendant. The plaintiff is entitled to cost of these proceedings. I accordingly order the first Defendant to pay summarily assessed costs of \$600.00 to the plaintiff.

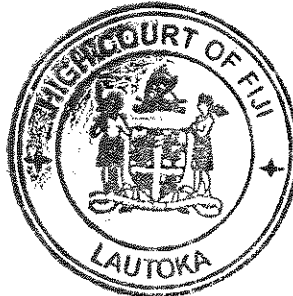
Final outcome

1. Application for leave to appeal refused.
2. Summons to amend is dismissed and struck out.
3. The first Defendant will pay summarily assessed costs of \$600.00 to the plaintiff.
4. The matter is to be relisted before the Master for further direction at 8.30am on 28 April 2017.

M H Mohamed Ajmeer
10/4/17

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M H Mohamed Ajmeer

JUDGE



At Lautoka

10 April 2017

Solicitors:

M/s Gordon & Co, Barristers & Solicitors for first defendant

M/s Young & Associates for plaintiffs